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Whistle-Blowers, Spies—and Journalists?

The First Amendment was on the ropes in 17. Theodore Roosevelt spoke for much of the country when he thundered, "the clergyman who does not put the flag above the church had better close his church and keep it closed." And Woodrow Wilson, a month and a half after war was declared, urged Congress to give him power under the pending Espionage Act to censor the press. Such action, he said, is "absolutely necessary to the public safety."

Yet even in that time of war, the members of Congress turned down the only president they could. As it worked out, the Espionage Act was more than sufficiently broad to inflict huge wounds on freedom of speech in those years. But the press had been largely sheltered by Congress. In 1950, when the Espionage Act was being amended as part of the larger Internal Security Act, Sen. Patrick McCarran, never known to be soft on espionage, inserted a proviso which not only guaranteed the press would

be free of censorship but also said the statute could not be construed to limit freedom of the press or of speech in any way.

Since 1917, then, with only two exceptions, the Espionage Act has not been used by the government to prosecute the leaking to the press—rather than to foreign intelligence agents—of classified documents relating to national defense. One exception was the prosecution of Daniel Ellsberg and Anthony Russo for adding the Pentagon Papers to the open shelves, but that case was dismissed because of government misconduct.

The second exception, which so far has resulted in a first period victory for the Justice Department, is the recent conviction under the Espionage Act of former Navy intelligence analyst Samuel Loring Morison. He leaked three spy satellite photographs—each classified "Secret"—of a nuclear-powered Soviet aircraft carrier under construction at a Black Sea shipyard. Morison has also been convicted of having

unauthorized possession of other documents classified "Secret."

Morison had been working part-time for Jane's Fighting Ships, the prestigious British publication, and the leaked satellite photographs appeared in a companion journal, Jane's

Defence Weekly. The United States is not presently at war with Britain, but the Justice Department, wielding the Espionage Act, claims that the Russians will add to their knowledge of our spying capacities from the published photos—a contention disputed by former CIA official Roland S. Inow, an expert on spy satellites.

In any case, the Justice Department insists Morison's crime was the leaking to unauthorized people of material that the United States

government has classified secret. Despite prosecutorial shiftlessness in the past, this sort of thing must at last be stopped. Without exceptions. As the Justice Department said in its response to Morison's motion for dismissal:

"If a defendant, such as Morison, willfully transmits photographs relating to the national defense to someone who is known by the defendant not to be entitled to receive it, the defendant has violated [the law] no matter how laudable his motives." Even if Morison had been inspired "to expose obvious wrongdoing in high official circles, he would be just as guilty."

In the age of Reagan, the definition of espionage now also includes whistle-blowing.

If Morison's appeal fails, the government will finally have a way to freeze the press's sources in these matters. And eventually, journalists themselves may be persuaded to let only the government decide just what matters of national defense can be printed. Eugene McCarthy Jr. of The New York Times reported that Jus-

justice Department officials do not consider the press exempt from prosecution as receivers of unauthorized leaks involving any of the hostiles of documents classified as "Secret," and a few long prison sentences for reporters and editors could prod other journalists to reassess their news-gathering priorities.

This is indeed a Justice Department that gets things done. Or, as Samuel Loring Morison's lawyers point out in one of the court papers: "The government is asking this Court to construe the statutes at issue here as general anti-leak statutes despite the fact that Congress repeatedly has refused to enact such a law. The government therefore is asking this Court to go beyond its constitutional limits and make a legislative decision that properly can be made only by Congress."

Apparently the attorney general is not opposed to judges who function as legislators—provided, of course, they act in the national interest.

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